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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

PAUL E. SULLIVAN, ET AL., PETITIONERS

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., PETITIONERS

v.

LITTLE HUNTING PARK, INC., ET AL.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

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BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

CONSTITUTIONAL AND STATUTORY PROVISIONS:

MISCELLANEOUS:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 929

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BRIEF FOR THE PETITIONERS

PRIOR OPINIONS

The previous *per curiam* opinion of this Court remanding these cases to the Supreme Court of Appeals of Virginia is reported at 392 U.S. 657 (A. 244). The opinion of the Supreme Court of Appeals of Virginia subsequent to the order of remand is reported at 209 Va. 279, 163 S.E.2d 588 (A. 247). The memorandum orders of the Supreme Court of Appeals of Virginia rejecting the appeals from the trial court were entered December 4, 1967, and are not

reported (A. 242, 243). The decision of the trial court in the *Sullivan* case was contained in a letter to the parties dated April 7, 1967, which is reported at 12 Race Rel. L. Rep. 1008, and the decree was entered April 12, 1967 (A. 232-234). The trial court's decision in the *Freeman* case was contained in a letter dated April 21, 1967, which is not reported, and the decree was entered May 8, 1967 (A. 235-236).

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered October 14, 1968. The petition for a writ of certiorari was filed January 10, 1969, and was granted April 1, 1969. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of Virginia properly relied upon a non-federal procedural ground as the sole basis for refusing to accept the remand of this Court after this Court had held that such ground was inadequate to bar consideration of the federal questions presented by this case.

2. Whether the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) which guarantees Negroes the same rights as are enjoyed by white persons to make and enforce contracts and to lease and hold property is violated when a Negro, because of his race, is not permitted by the board of directors of a community recreation association to use a membership share which has been assigned to him by his landlord as part of the leasehold estate.

3. Whether a landlord who is expelled from a community recreation association because he voices disagreement with the directors' racially motivated refusal to approve his assignment of a share in the association to his Negro tenant may obtain relief from the association's retaliatory action under the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982).

4. Whether the Fourteenth Amendment to the Constitution of the United States is violated by a community recreation association when it excludes from its facilities on the basis of his race, a person who is otherwise eligible to use them, and by a state court in sanctioning the exclusion.

5. Whether the free speech protections of the First and Fourteenth Amendments to the Constitution of the United States are violated by a community recreation association when it expels a shareholder for dissenting from its discriminatory racial policy, and by a state court in sanctioning the expulsion.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions involved are 42 U.S.C. §§ 1981 and 1982. The relevant provisions of the Constitution of the United States are Article VI, the First Amendment, the Thirteenth Amendment, and the Fourteenth Amendment, Section 1. The foregoing provisions are set forth in the Appendix, *infra*, pp. 57-59.

STATEMENT

A. Introduction

These cases are before the Court following the refusal by the Supreme Court of Appeals of Virginia to accept the remand ordered by this Court on June 17, 1968. 392 U.S. 657.[1]

[1] The petitioners at bar in the *Sullivan* case, in addition to Paul E. Sullivan, are Flora L. Sullivan, his wife, and their seven minor children, William F. Sullivan, Graciela P. Sullivan, Ana I. Sullivan, Maire Sullivan, M. Dolores Sullivan, M. Monica Sullivan, and Brigid Sullivan, who sued by and through Paul E. Sullivan, their father and next friend. In the *Freeman* case the petitioners, in addition to T. R. Freeman, Jr., are Laura Freeman, his wife, and their two minor children Dale C. Freeman and Dwayne L. Freeman, who sued by and through T. R. Freeman, Jr., their father and next friend. Respondents in both cases, in addition to Little Hunting Park, Inc., are Mrs. Virginia Moore, Ronald L. Arnette, S. Leroy Lennon, Raymond R. Riesgo, Mrs. Marjorie Madsen, William J. Donohoe, Oskar W. Egger,

Briefly, respondent Little Hunting Park, Inc., is a Virginia non-stock corporation organized for the purpose of operating a community park and swimming pool for the benefit of residents of certain housing subdivisions in Fairfax County, Virginia. A person who owns a membership share entitling him to use the association's facilities is permitted under the corporate by-laws, in the event he rents his house to another, to assign the share to his tenant, subject to approval by the board of directors. In the instant case the directors refused to approve such an assignment from Paul E. Sullivan to Dr. T. R. Freeman, Jr., solely on the ground that Freeman and the members of his family are Negroes. When Sullivan protested the directors' discriminatory racial policy and sought to reverse their refusal to approve the assignment, they expelled him.

Petitioners brought two suits in the state court challenging on federal and state grounds the racial restriction imposed by the directors on the assignment of the share in the association. Additionally, Sullivan asserted the unlawfulness of his expulsion. Injunctive relief and monetary damages were sought in both cases (A. 4-36). Following the overruling of a demurrer in the *Freeman* case (A. 40-41), two trials were conducted, resulting in dismissal of both complaints. The trial judge held that the corporation is a "private social club" with authority to determine the qualifications of those using its facilities, including the right to deny such use on the basis of race (A. 232, 235). The court also held that the corporation's expulsion of Sullivan was permitted by its by-laws and was justified by the evidence (A. 232). Petitions for appeal were thereafter submitted to the Supreme Court of Appeals of Virginia, which were rejected for the stated reason that petitioners had failed to comply with a procedural rule of that court (A. 242-243).[2]

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and Milton W. Johnson, individuals who were directors of said corporation at times material herein.

[2]The Virginia court, citing its Rule 5:1, Sec. 3(f), (Appendix, *infra*, pp. 58-59), stated that the appeals were "not perfected in the

In their first petition for a writ of certiorari filed in this Court on March 1, 1968 (No. 1188, October Term 1967), petitioners contended that the Virginia court's interpretation of its procedural rule to bar the appeals was arbitrary and unreasonable—warranted neither by the facts nor the court's prior construction of its procedural rule. Accordingly, petitioners asserted that in view of the claimed violations of their federally protected rights, the procedural ground on which the state court based its decision should be examined to determine its adequacy to bar review of the proceeding by this Court. In a *per curiam* opinion rendered June 17, 1968, the Court granted certiorari, vacated the judgment and remanded the case to the Supreme Court of Appeals of Virginia for further consideration in light of *Jones v. Mayer Co.*, 392 U.S. 409. *Sullivan v. Little Hunting Park, Inc.*, 392 U.S. 657 (A. 244).

The mandate of this Court (A. 245-246) was thereafter received by the Supreme Court of Appeals of Virginia and on October 14, 1968, that court issued an opinion declaring its refusal to accept the remand. The court cited as its reason the same ground originally given for refusing to hear the cases, *i.e.*, petitioners' asserted failure to perfect their appeals from the trial court because of non-compliance with the procedural rule (A. 247-250).

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manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it" (A. 242, 243). The rule referred to provides that as part of the procedure for certifying a record for appeal the reporter's transcript must be tendered to the trial judge within 60 days and signed at the end by him within 70 days after final judgment. The rule also states: "Counsel tendering the transcript . . . shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it." 2 Code of Virginia, 1950 (1957 Replace. Vol.) 602.

II. Little Hunting Park, Inc.: Its purpose and manner of operation

Little Hunting Park, Inc. was incorporated in 1954 under the Virginia Non-Stock Corporation Law[1] for the purpose, as set forth in its certificate of incorporation, of organizing and maintaining "a community park and playground facilities" for "community recreation purposes" (A. 24, 130-131). Pursuant to this object, the corporation owns land on which it has built and operates a swimming pool, tennis courts and other recreation facilities for the benefit of residents of the subdivisions known as Bucknell Manor, Beacon Manor, White Oaks, Bucknell Heights and certain adjacent neighborhoods in Fairfax County, Virginia (A. 28, 121, 143). The corporation's by-laws provide that shares may be purchased by adult persons who "reside in, or who own, or who have owned housing units" in one of the specified subdivisions (A. 28, 121). A share entitled all persons in the immediate family of the shareholder to use the corporation's recreation facilities (A. 28, 121-122).

The by-laws limit the number of shares in the corporation to 600 (A. 28, 121). There is no limit, however, to the number of shares that an individual may own, and it is not unusual for a person owning more than one house in the neighborhood served by Little Hunting Park pool to own a separate share for the use of the family occupying each house (A. 46, 124-124). Shares may also be purchased by institutions and corporations owning property in the area where the swimming pool is located. Thus, a share is owned by a church located in the neighborhood, and shares have been owned by two real estate companies that built and marketed the houses in Bucknell Manor and Beacon Manor, subdivisions served by Little Hunting Park. These two corporations have, at various times, owned at least 25 shares which they have retained for periods ranging from 5 to 7 years (A. 216-218).

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[1] § 13-220, Code of Virginia, 1950 (1949 ed.).

The right to use Little Hunting Park's facilities may be acquired by purchase or by temporary assignment of a corporate share. The share may be purchased directly from the corporation, from any shareholder, or, upon buying a home in the community, from the vendor as part of the consideration for the purchase price of the house (A. 46, 28-29, 122-123). A person residing within one of the subdivisions served by Little Hunting Park may obtain temporary assignment of a share; however, an assignment may only be made from landlord to tenant (A. 28-29, 123, 128).[4]

The corporation's by-laws have always provided that the issuance and assignment of shares are subject to approval by the board of directors (A. 29, 49-50, 125, 148). There were 1,184 shares issued and 122 shares assigned during the period from 1955 through 1966, the first 12 years of the corporation's existence (A. 125-126). However, with the exception of the assignment described below to Dr. T. R. Freeman, Jr., there is no record of any assignment ever being denied approval by the directors (A. 127-128). One applicant for the purchase of a share was disapproved during that period, but there is no evidence that this was other than because of the individual's failure to satisfy the geographic residence requirement of the by-laws (*ibid.*).

C. The corporation's directors refuse to approve the assignment of Paul E. Sullivan's share because the assignee, Dr. T. R. Freeman, Jr., and his family are Negroes.

From December 1950 to March 1962, Paul E. Sullivan and his family lived in a house which Sullivan owned and continues to own on Quander Road in the Bucknell Manor subdivision (A. 45). In May 1955, shortly after Little

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[4] Regardless of whether the swimming pool and park facilities are used by the shareholder or assignee, the owner of a share is obligated to pay an annual assessment in order to keep his share valid (A. 46, 128).

Hunting Park, Inc. was organized, Sullivan purchased a share, No. 290, for $150 (*ibid.*). In March 1962, Sullivan and his family moved a short distance to another house that Sullivan purchased located on Coventry Road in the White Oaks subdivision where, as part of the purchase price for the property, Sullivan acquired a second share from the seller of the house. Share No. 925 was thereafter issued to Sullivan by the corporation (A. 46, 78-79). After moving to Coventry Road, Sullivan continued paying the annual assessments on shares Nos. 290 and 925, and leased his house on Quander Road to various tenants. In consideration of the rent, he assigned share No. 290 as part of the leasehold interest (A. 46, 49). As Sullivan testified, the lease arrangement was a "package deal . . . the house, the yard and the pool share" (A. 46).

On February 1, 1965, Sullivan leased the Quander Road premises for a term of one year to Dr. I. P. Freeman, Jr. at a rent of $1,548, payable in monthly installments of $129 (A. 46-47). The deed of lease described the property demised as "the dwelling located at 6810 Quander Road, Bucknell Manor, Alexandria, Virginia 22306, and Little Hunting Park, Inc. pool share No. 290" (Pl. Ex. 1, A. 47, 177). The lease was extended in identical terms as of February 1, 1966, and February 1, 1967 (A. 47). Dr. Freeman met all of the eligibility requirements for an assignee of a share in the corporation, since he is an adult, and the house that he leased from Sullivan is in Bucknell Manor subdivision (A. 47, 131). Freeman has no disqualifications, he is an agricultural economist with a Ph.D. degree from the University of Wisconsin, and at the time of the events herein was employed by the Foreign Agriculture Division of the United States Department of Agriculture (A. 116-117). He also holds the rank of Captain in the District of Columbia National Guard (A. 117). Dr. Freeman and his wife and children are Negroes (*ibid.*).

In April 1965, Paul E. Sullivan paid the annual assessment of $37 on share No. 290 and, pursuant to his obliga-

tion contained in the lease on the Quander Road property, completed the form prescribed by the corporation affirming that Dr. Freeman was his tenant and therefore eligible to receive the assignment of that share (A. 47-48). Additionally, Dr. Freeman supplied certain information and signed the form, thereby doing everything required by the corporation to qualify as an assignee of the share (A. 48). However, the board of directors of the corporation, meeting on May 18, 1965, refused to approve the assignment of share No. 290 to Dr. Freeman, because he and the members of his family are Negroes (A. 48, 51-52, 112-113, 130-131, 145-146, 155-156, Pl. Ex. 12; A. 55, 188-189). On May 25, 1965, Sullivan received a letter from S. I. Lennon, the corporation's membership chairman, notifying him that his assignment of share No. 290 to Dr. Freeman had been denied approval by the board of directors, no reason was given (Pl. Ex. 7, A. 48-49, 178-179).

D. The corporation's directors expel Paul F. Sullivan because of his criticism of their refusal to approve the assignment of his share to Dr. T. R. Freeman, Jr. on the basis of race.

Sullivan, upon learning of the directors' disapproval of his assignment to Dr. Freeman, sought further information concerning their action (Pl. Ex. 8; A. 50, 179-180, 49). In response to his inquiry, a delegation from the board membership chairman S. I. Lennon, John R. Hanley, a former president and director of the corporation, and Oskar W. Egger, a director visited Mr. and Mrs. Sullivan at their home on May 28, 1965, and admitted that Dr. Freeman had been rejected solely because of his race (A. 51-53, 112-113, 147-148, 150-151, 155, Pl. Ex. 12; A. 55, 188-189). To Sullivan, this action was shocking, and as a matter of his religious teaching and conviction, immoral; he so informed the delegation. Furthermore, as a resident of the neighborhood for many years and as a member of Little Hunting Park, Inc. since its inception, he could not believe their assertion that the board's action reflected the unani-

mous view of the members of the corporation (A. 52, 54, 112-114). Nor could Sullivan in good conscience accept the board's offer to purchase share No. 290 which he had contracted to assign to Dr. Freeman (A. 52).

Following this meeting, Sullivan and Dr. Freeman, who was also his fellow parishioner, sought the advice of their priest, Father Eugene Walsh, who suggested that the board might reconsider its action if the directors had an opportunity to meet with Dr. Freeman and consider his case on its merits (A. 36-37). The suggestion that such a meeting be held was rebuffed, however, by Mrs. Virginia Moore, the corporation's president, when Sullivan spoke to her on June 9 (A. 37-38). At about the same time, Sullivan spoke with several other shareholders, who, upon learning of the board's action, wrote letters to President Moore in which they expressed their strong disagreement with the board's action in disapproving Dr. Freeman (A. 117-141). After receipt of these letters, the board met on June 11, and decided that there appeared to be "due cause" for Sullivan's expulsion from the corporation because of his "non acceptance of the Board's decision" on the assignment of his share "along with the continued harassment of the board members, etc." (Pl. Ex. 11, A. 59, 190, 130, 138-139).[3]

Sullivan was told of the board's action in a letter from President Moore dated July 7, 1965, which also informed him that he would be given a "hearing" by the directors on July 20, 1965 (A. 59). Because the directors refused to postpone the hearing in order that Sullivan's attorney could appear with him, and because they refused to provide Sullivan with a statement of the conduct alleged to constitute the basis for his expulsion, Sullivan commenced a civil action in the Circuit Court of Fairfax County to enjoin the

[3] The sole ground for expulsion provided under the corporate by-laws is for conduct "inimicable [sic] to the corporation's members." Article III, Section 6(b). The board purported to act under this section in expelling Sullivan (A. 29, 59, 131-132).

hearing (Pl. Ex. 19; A. 70-71, 198-200). Settlement of the action was reached upon the corporation's agreeing to postpone the hearing to August 17, 1965, and to furnish a detailed statement of the charges against him (*Ibid.*). A statement specifying the alleged grounds for Sullivan's expulsion was thereafter furnished to him (Pl. Exs. 9, 10, 11; A. 53-54, 180-181, 211).[6]

At the hearing held by the directors on August 17, no evidence was introduced in support of any of the allegations against Sullivan, and he was not permitted to learn the identity of the persons making charges against him, nor to question them. He was also denied permission to have a reporter present to transcribe the proceeding. He had only the opportunity to present evidence concerning the charges as he understood them, and to state his views (A. 61, 71-72, 77, 97-98, 157-158). On August 24, 1965, the board met, and unanimously voted to expel Sullivan (A. 143). By letter of August 27, 1965, Sullivan was notified by President Moore of his expulsion, and he was tendered the then current "sale price" of his two shares, plus prorated annual assessments on the two shares, the total amounting to $199.14 (Pl. Ex. 20; A. 77, 200-201, 116).

F. Relief sought

Petitioners seek injunctive relief and monetary damages under the Civil Rights Act of 1866 (14 Stat. 27, 42 U.S.C. §§ 1981, 1982), as well as under the First, Thirteenth and Fourteenth Amendments. However, since the petitioners in the *Freeman* case no longer reside in the area served by Little Hunting Park, Inc., their claim is now limited solely to compensatory and punitive damages, pursuant to the allegations of their complaint, as the result of having been denied access for 2 years to the community recreation facilities operated by the corporation.[7] Petitioners in the

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[6] The allegations against Sullivan are discussed in detail, *infra*, pp. 39-50.

[7] In June 1967, Dr. Freeman and his family left the United States

Sullivan case, in addition to seeking an order compelling full reinstatement of Paul E. Sullivan in Little Hunting Park, Inc. and reinstatement of share Nos. 290 and 925, ask for a declaration of the invalidity of the association's racial policy and an injunction against its continued observance. They also seek compensatory and punitive damages from respondents for Paul E. Sullivan's wrongful expulsion from the association and the denial to them of the use of its facilities.

SUMMARY OF ARGUMENT

I

The Supreme Court of Appeals of Virginia, on the sole ground that petitioners had allegedly failed to perfect their appeals from the trial court, refused to accept the remand of this Court. This non federal procedural ground was the same reason advanced by the Virginia court initially in refusing to hear the appeals, and this Court's remand on the first petition for a writ of certiorari constituted an implicit holding that the state procedural ground of decision was inadequate to bar consideration of the important federal questions raised. This is the law of the case, therefore, and the Virginia court by failing to adhere to it and to comply with the order of remand, violated its duty under the Supremacy Clause of the Constitution. On the other hand, if the Court concludes that it has not settled the question of the adequacy of the state ground of decision, petitioners submit that they did comply with the procedural rule as construed in prior decisions of the Virginia court. Therefore, the discretionary decision of the Virginia court in refusing to hear the appeals was plainly arbitrary and does not foreclose this Court's consideration of the case in view of the important federal rights asserted by petitioners.

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for Pakistan where Dr. Freeman was to serve as Assistant Agricultural Attache in the United States Embassy.

II.

The board of directors of Little Hunting Park, Inc. refused to approve the assignment of the membership share in the corporation to Dr. T. R. Freeman because he and his family are Negroes, thereby denying the Freemans the same rights as white persons to make and enforce contracts, and to lease real and personal property, as guaranteed by the Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982). The racial policy of the respondents not only denies Negroes the right to use the community recreation facilities operated by the corporation, but tends to reinforce a pattern of racial segregation in housing, since access to such facilities bears an important relationship to the desirability and market value of residential property in neighborhoods such as those in suburban metropolitan Washington, D.C. Negroes will naturally be discouraged from moving into a locality where they are barred from recreation facilities which are open to white residents of the neighborhood. Furthermore, since Little Hunting Park, Inc. was created to and does serve the public function of providing community recreation facilities, a function shown to be abdicated by local governments to private organizations, the corporation may not, consonant with the requirements of the Fourteenth Amendment, operate on a racially segregated basis. Finally, the state court was without authority under the Fourteenth Amendment to sanction or give validity to the racial bar interposed by the corporation to the assignment of the membership share from Sullivan to Freeman. *Shelley v. Kraemer*, 334 U.S. 1.

III.

42 U.S.C. §§ 1981, 1982 not only guarantee rights of freedom from discrimination to Negroes, but also impose correlative obligations on persons not to treat Negroes discriminatorily. Thus, if Sullivan had refused to assign his membership share in the association to Freeman because of the latter's race, he would have violated the statute. However, because he dealt with Freeman on a non-

discriminatory basis and sought to reverse the directors' refusal to approve the assignment so that he could fulfill his contract to Freeman, Sullivan was expelled from the association. Since Sullivan's expulsion was in retaliation for his having obeyed the dictate of the law the expulsion was against public policy, and he should be reinstated. For the law to sanction punishment of a person such as Sullivan for refusing to discriminate against Negroes would be to render nugatory the rights guaranteed to Negroes by 42 U.S.C. §§1981, 1982, and encourage the use and observance of racial restrictions on contracts and property. *Barrows v. Jackson*, 346 U.S. 249. Furthermore, by giving sanction to Sullivan's expulsion, the state court deprived Sullivan of his rights, guaranteed by the First Amendment to criticize the conduct of the association's directors, who, by virtue of holding that position in community life, had become public figures. *Curtis Publishing Co. v. Butts*, 388 U.S. 130. Since the operation of a community recreation facility such as Little Hunting Park is a public function, the association which operates such a facility may not permissibly condition the use of its property upon the forfeiture of an individual's First Amendment rights. *Marsh v. Alabama*, 326 U.S. 501; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308. Sullivan's expressions of dissent from Little Hunting Park's racial policy were well within judicially recognized limits of permissible conduct, and were in performance of his higher public duties as a citizen. The false and exaggerated accusations brought by the directors against Sullivan to justify his expulsion from the association confirm the retaliatory motive underlying the action. Since, as shown, Sullivan's expulsion violated public policy as well as constitutional principles, he is entitled to reinstatement.

IV.

As a consequence of respondents' actions, petitioners have been denied access to the community recreation facilities operated by Little Hunting Park, Inc. They have also

suffered damage to their reputations and have been subjected to severe physical and emotional strain arising from the humiliation, embarrassment and indignity caused by respondents' conduct. Petitioners, therefore, not only should be compensated for these injuries, but respondents, because of their malicious and unjustified conduct in manifest disregard of the rights of petitioners should be required to respond in punitive damages.

V.

In view of the recalcitrance displayed by the Supreme Court of Appeals of Virginia in refusing this Court's prior remand, the Court should eschew futility, and exercise its inherent power to enter an order reversing the judgments of the courts below, and directing the trial court to enter an appropriate decree, including provision for such damages as that court may fix in accordance with standards delineated by this Court.

ARGUMENT

I. THE SUPREME COURT OF APPEALS OF VIRGINIA IMPROPERLY REFUSED TO ACCEPT THIS COURT'S REMAND OF THE CASE

A. The non-federal procedural ground on which the Virginia court based its rejection of the remand had previously been held by this Court to be inadequate to bar consideration of petitioners' asserted federal rights.

This Court, by vacating the original judgment of the Supreme Court of Appeals of Virginia and remanding this proceeding to that court for further consideration, impliedly held that the non-federal ground on which the Virginia court had rejected the original appeals was inadequate to bar consideration of the important federal rights asserted by petitioners. In their first petition for a writ of certiorari in this Court, petitioners discussed in detail the question of their alleged non-compliance with the Virginia court's procedural rule. Petitioners related the various steps

which they had taken pursuant to the state rule, and showed that they had in fact complied with its terms as construed in prior decisions by the Virginia court. Accordingly, petitioners urged this Court to examine the record of the state proceedings to determine whether the "procedural ground" on which the Virginia court based its judgment was "adequate to bar review by this Court," citing *Parrot v. City of Tallahassee*, 381 U.S. 129.[8] Further, in their brief in opposition to the first petition for certiorari respondents relied solely on the contention that petitioners had not perfected their appeals because of alleged noncompliance with the procedural rule.

This Court's holding, implicit in its order vacating the judgment and remanding to the state court, that the state ground of decision was inadequate to bar consideration of the federal questions involved represented the law of the case which the Virginia court was required to observe *Tyler v. Magwire*, 17 Wall. 253, 282-283; *Sibbald v. United States*, 12 Pet. 488, 491-492; *Durant v. Essex Co.*, 11 Otto 555, 556-557. However, the court refused to accept the remand, repeating the same reason that it had given previously for rejecting the appeals, namely, petitioners' alleged failure to comply with the procedural rule. As a consequence, the court failed to reconsider the case, as this Court had directed, in light of *Jones v. Mayer Co.*[9] By refusing to accept this Court's decision that the state ground was an inadequate basis for disposing of petitioners' rights, the Virginia court violated its duty under the Supremacy Clause of Article VI of the Constitution. *Martin v. Hunter's Lessee*, 1 Wheat. 304. The state court's decision

[8]In their petition for certiorari, petitioners also relied on *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 297; *Staub v. City of Baxley*, 355 U.S. 313, 318-320; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 454-458.

[9]State courts, of course, are frequently called on to construe federally created rights. See, *Testa v. Katt*, 330 U.S. 386, and cases therein cited; *Chesapeake & Ohio Ry Co. v. American Exchange Bank*, 92 Va. 495, 23 S.E. 935, 937; *Schaubach v. Anderson*, 184 Va. 795, 36 S.E. 2d 539, 541-542.

cannot stand, therefore, and it is appropriate for this Court to proceed to a consideration of the merits of petitioners' claims.[10]

B. The procedural ruling of the Supreme Court of Appeals of Virginia which was the basis for its refusal to hear this proceeding is arbitrary and unreasonable, and inadequate to bar consideration of petitioners' asserted federal rights.

If the Court concludes that it has not settled the question of the adequacy of the state ground of decision and decides to give further consideration to that issue, the relevant facts and authorities are as follows:

The decree was entered in the *Sullivan* case by the trial court on April 12, 1967, and in the *Freeman* case on May 8, 1967 (A. 233-234, 236). It is undisputed, as shown by the affidavits of counsel filed in the trial court, and incorporated in the record, that on the morning of June 9, 1967, counsel for the petitioners, Mr. Brown, notified Mr. Harris, counsel for the respondents, by telephone that he would submit the reporter's transcripts in the two cases to the trial judge that afternoon (A. 238-239). Mr. Brown further informed Mr. Harris that because of errors in the transcripts, he was filing motions for correction of the record, noticing them for hearing one week hence, Friday, June 16, 1967, which was the court's next Motion Day (A. 239). Finally, Mr. Brown told counsel that he would request the trial judge to defer signing both transcripts for a 10-day period to allow time for Mr. Harris to consent to the motions or to have them otherwise acted on by the court (*ibid.*). That same day, June 9, Mr. Brown wrote Mr. Harris to confirm their telephone conversation, and in his letter Mr. Brown reiterated that he would request the judge not

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[10] If the Court agrees with petitioners' first contention that it has previously decided that the state ground of decision was inadequate to support the judgment, this holding presumably is not now subject to reexamination. *Tyler v. Magwire, supra,* 17 Wall. at 283-284; *N.A.A.C.P. v. Alabama,* 360 U.S. 240, 245, and cases cited.

to sign the transcripts until they had been corrected (A. 237, 239). The afternoon of June 9, when Mr. Brown sought to tender the transcripts to the judge, the latter was away from his office and not expected to return that day, so Mr. Brown left the transcripts as well as a copy of his letter to Mr. Harris with the judge's secretary; the judge later ruled that the tender of the transcripts was made on Monday, June 12, the day that he received them (A. 239, 118, 176, 231, 239). Meanwhile, motions to correct the two transcripts were served on Mr. Harris, along with the notice that they would be brought to hearing before the court on Friday, June 16 (A. 239-240).

On Monday morning, June 12, the trial judge acknowledged to Mr. Brown over the telephone that he had received the transcripts and the motions to correct the record (A. 241). Pursuant to Mr. Brown's request, he agreed to defer signing the transcripts until the motions had been acted on (*ibid.*). That same day, Mr. Harris wrote to Mr. Brown in reference to their telephone conversation of the preceding Friday, noting that because he did not have copies of the transcripts he could not consent to the requested corrections without reviewing the testimony (A. 238).

On Friday, June 16, the judge stated in court that the transcripts had been available in his office for one week, since the preceding Friday, for examination, but since it appeared that Mr. Harris had not examined them, the motions to correct the record would not be acted on until Mr. Harris indicated his agreement or disagreement with the changes requested (A. 240). In order to facilitate Mr. Harris' examination of the transcripts, Mr. Brown lent him the petitioners' duplicate copies, which Mr. Harris had in his possession from 1:20 p.m., June 16, until 6:30 p.m., June 19, at which time they were returned to Mr. Brown (*ibid.*). Upon returning the transcripts, Mr. Harris stated that he had no objection to any of the corrections requested by the petitioners or to the entry of orders granting the motions to correct the transcripts (*ibid.*). Mr. Harris then

signed the proposed orders granting the motions which Mr. Brown had prepared (*ibid.*). The proposed orders were submitted to the trial judge on June 20, who thereupon entered them, and after the necessary corrections were made, signed the transcripts on that date (*ibid.*).

On the basis of the foregoing facts and relevant decisions of the Supreme Court of Appeals of Virginia, it is clear that petitioners fully complied with Rule 5:1, Sec. 3(f). That Court has repeatedly held that the rule is complied with when, as here, opposing counsel has actual notice of the tender of the transcript to the trial judge and has a reasonable opportunity to examine the transcript for accuracy before it is authenticated by the judge. See *Bacigalupo v. Fleming,* 199 Va. 827, 102 S.E.2d 321, 326; *Hyson v. Dodge,* 198 Va. 792, 96 S.E.2d 792, 798-799; *Kornegay v. City of Richmond,* 185 Va. 1013, 41 S.E.2d 45, 48-49. In construing the rule, the Virginia court follows the practice of considering the facts and circumstances of each case, and on numerous occasions has overruled objections to appeals where, as here, it appears that the purpose of the rule has been satisfied and the appellee has not shown that he was "in any way prejudiced" by the procedure followed. *Stokely v. Owens,* 189 Va. 248, 52 S.E.2d 164, 167.[11] The *Bacigalupo* case *supra,* involved circumstances almost identical to those presented here, and illustrates the liberal construction customarily placed by the Virginia court on the rule in question. There the trial judge, after ruling that the prior notice to opposing counsel of tender had not met the requirement of reasonableness, advised the parties that he would defer signing the transcript for seven days to afford counsel opportunity to examine the transcript and indicate his objections, if any. In holding that this procedure complied with Rule 5:1, Sec.

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[11] See also, *Cook v. Virginia Holsom Bakeries, Inc.,* 207 Va. 815, 153 S.E. 2d 209, 210; *Grimes v. Crouch,* 175 Va. 126, 7 S.E. 2d 115, 116-117; *Town of Falls Church v. Myers,* 187 Va. 110, 46 S.E. 2d 31, 34-35; *Taylor v. Wood,* 201 Va. 615, 112 S.E. 2d 907,910.

3(f), the Supreme Court of Appeals stated (102 S.E.2d at 326):

> The requirement that opposing counsel have a reasonable opportunity to examine the transcript sets out the purpose of reasonable notice. If, after receipt of notice, opposing counsel be afforded reasonable opportunity to examine the transcript and to make objections thereto, if any he has, before it is signed by the trial judge, the object of reasonable notice will have been attained.

It is thus clear that even if insufficient advance notice was given to respondents' counsel, Mr. Harris, of the tender of the transcripts to the judge, this deficiency was cured by the ample opportunity that Mr. Harris had after the tender to examine the transcripts and the motions to correct the transcripts, and to make any objections thereto. Further, Mr. Harris' signing of the proposed orders granting the motions to correct the transcripts shows that he had examined the transcripts and the proposed corrections, and "waived" any further objections that he had to the procedure being followed. *Kornegay v. City of Richmond, supra; Grimes v. Crouch, supra; Taylor v. Wood, supra.*[12]

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[12] Respondents have suggested that Mr. Harris did not have sufficient time to examine the transcripts even after their tender to the judge. This is baseless, however, for as shown above, the judge noted that the transcripts were available for examination in his office for a week prior to his consideration of the motions to correct the record. Further, Mr. Harris had petitioners' copies of the transcripts in his possession for an additional 3½ days, after which he voluntarily relinquished them and signed the proposed orders granting the motions to correct the transcripts. Finally, since the decree of the trial court in the *Freeman* case was not entered until May 8, 1967, the 70-day period under Rule 5:1, Sec. 3(f) within which the judge was required to sign that transcript did not expire until July 17, 1967. Thus, Mr. Harris had over a month to examine the *Freeman* transcript after tender, had he desired further time.

Although the Supreme Court of Appeals of Virginia, in its opinion rejecting the remand from this Court, characterizes the procedural rule in question as "jurisdictional,"[13] it is clear from the *Bacigalupo* decision and other cases cited above that the court exercises substantial discretion in determining whether the rule has been complied with. The state court thus not only ignored its own precedents in reaching the result it did here, but under the mode of practice that it allows, could have exercised its discretion to hear the appeals. That court's "discretionary decision" to deny the appeals does "not deprive this Court of jurisdiction to find that the substantive issue[s]" are properly before it. *Williams v. Georgia*, 349 U.S. 375, 389; *Shuttlesworth v. City of Birmingham*, 376 U.S. 339. See also, *Ward v. Board of County Commissioners*, 253 U.S. 17, 22; and cases cited *supra*, p. 16 at n. 8.

II. THE DISCRIMINATORY RACIAL POLICY OF LITTLE HUNTING PARK, INC. VIOLATES THE CIVIL RIGHTS ACT OF 1866 (42 U.S.C. §§ 1981, 1982)

On the basis of the Court's recent decision in *Jones v. Mayer Co., supra*, 392 U.S. 409, it is clear that the discrimination inflicted by respondents on T. R. Freeman, Jr. and his family because the Freemans are Negroes, deprived the Freemans of rights secured by 42 U.S.C. §§ 1981, 1982. Although the Court in the *Jones* case dealt principally with § 1982, since both § 1981 and § 1982 derive from a single clause of Section 1 of the Civil Rights Act of 1866 (14 Stat. 27), it is evident that they must be given comparable scope. Thus, like the right to "purchase [and] lease . . . real and personal property" the right to "make and enforce contracts" without discrimination on the basis of race is not merely an assurance against hostile state action but is a guarantee against "interference from any source whatever, whether governmental or private." *Jones v. Mayer Co., supra*, 392 U.S. at 423-424. Here, also Congress meant

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[13] And see *Snead v. Commonwealth*, 200 Va. 850, 108 S.E. 2d 399, 402.

exactly what it said—that it intended "to prohibit *all* racially motivated deprivations of the rights enumerated in the statute . . ." *Id.* at 426, 436 (emphasis in original). And it equally follows that "the statute thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." *Id.* at 413. On its face, therefore, § 1981 prohibits all private racially motivated conduct which denies or interferes with a Negro's right to make and enforce a contract.

The complaint in the *Freeman* case embodies two causes of action: one alleging wrongful interference by respondents with the performance of the deed of lease between Sullivan and Freeman, and the other asserting wrongful deprivation by respondents of Freeman's full use and enjoyment of the leasehold estate demised to Freeman under the deed of lease. Here the record shows that prior to Freeman's becoming a tenant in Sullivan's house, Sullivan had entered into the same type of lease agreement, including assignment of the pool share, with other tenants, but it was only in the case of Freeman, the Negro, that respondents interfered with the performance and prevented full use and enjoyment of the leasehold estate. By disapproving the assignment of Share No. 290 to Freeman and thus preventing performance of the contract between Sullivan and Freeman solely because of the latter's race, respondents violated Freeman's right under § 1981 to make and enforce a contract under the same conditions as white persons.

Freeman's rights under § 1982 also were violated by respondents. Share No. 290 was an integral part of the leasehold interest conveyed from Sullivan to Freeman and represented part of the value for which Freeman paid the rent specified in the lease. Therefore, respondents' refusal to approve the assignment infringed on Freeman's right under § 1982 to lease and hold real property without restriction on the basis of his race. In addition, it is evident that under common law principles a membership share in Little Hunting Park, Inc., a non-stock corporation, itself consti-

tutes personal property within the meaning of § 1982. *Hyde v. Woods*, 4 Otto 523; *Page v. Edmunds*, 187 U.S. 596; *Baird v. Tyler*, 185 Va. 601, 39 S.E.2d 642, 645-646.[14] Accordingly, by refusing to permit the assignment of share No. 290 from Sullivan to Freeman pursuant to their lease agreement, respondents violated additional rights secured to Freeman under that section.

From the foregoing it is seen that respondents' discrimination against Dr. Freeman because of his race falls within the express terms of both § 1981 and § 1982. But more than a simple denial of access to a community swimming pool is involved, for here, as with the plaintiffs in the *Jones* case, the discrimination suffered by Dr. Freeman bears directly on his choice of a home for himself and his family. The racial restriction erected by Little Hunting Park cannot help but discourage the Freemans and other Negro families from wanting to live in that neighborhood. White residents of the neighborhood, because they can obtain shares in the association through purchase or by assignment from their landlords, have access to local recreation facilities from which their Negro neighbors are barred.

There can be little doubt that the availability of neighborhood recreation facilities such as those provided by Little Hunting Park—a swimming pool, tennis courts and park—substantially enhances the desirability and value of

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[14] Whether or not a Little Hunting Park membership share is personal property under the law of Virginia is not necessarily controlling here. In light of the *Jones* case, the federal courts will be called upon to develop a body of law as to what, for example, constitutes "property" under § 1982 and a "contract" under § 1981. Such determinations should not be made subject to the law of the various state jurisdictions. In order that there be uniformity in the disposition of matters that are within the area of federal legislative jurisdiction, the fashioning and application of federal law is appropriate. *Clearfield Trust Co. v. United States*, 318 U.S. 363; *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457; *Howard v. Lyons*, 360 U.S. 593, 597. See also *United States v. Standard Oil Co.*, 332 U.S. 301, 307.

nearby residential property.[15] The real estate advertisements in any metropolitan newspaper reveal the emphasis that is placed on the accessibility of a swimming pool in a neighborhood, and attest to the great importance that is attached to this feature in marketing homes.[16]

Privately established recreation associations organized principally to build and operate neighborhood swimming pools have become particularly common in localities where other water recreation facilities such as public swimming pools and beaches are not readily accessible. Thus, in the Washington metropolitan area of Northern Virginia, where municipally operated swimming pools are virtually nonexistent,[17] there are about 50 community pool associations such as Little Hunting Park, Inc. and in all the Washington suburbs, including those in Northern Virginia and Maryland, there are over 105 pools of this type.[18] This number understandably increases each year as the suburban population increases and new housing subdivisions are opened.[19]

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[15]Expert evidence to this effect was offered by petitioners in the court below (A. 99-108, 223-228). Also see, Urban Land Institute, *Open Space Communities in the Market Place* (Tech. Bulletin 57, 1966) 41-42, 47-50 (Pl. Ex. 28; A. 103-106, 253-260).

[16]"[T]he community swimming pool is considered by most builders as one of their most popular sales appeals to people of all ages and incomes." 29 *Practical Builder* No. 2, p. 94 (Feb. 1964) (Pl. Ex. 29; A. 106-108, 261-266). In one 12-page advertising supplement in *The (Washington) Evening Star*, issue of January 20, 1967, there were over 50 advertisements for apartments and houses in which prominent mention was made of the swimming pool facilities (Pl. Ex. 30; A. 107-108).

[17]In the Northern Virginia suburbs, with a population of nearly 700,000 persons, there are only two municipally owned pools and one lake for swimming (A. 102).

[18]*The Washington Post*, p. A 20, June 12, 1967. A recent survey showed 42 community pool associations operating in Montgomery County, Maryland. *The (Washington) Evening Star*, p. B-1, Noon edition, April 25, 1969.

[19]In a recent study, authorized by Congress, the Outdoor Recreation Resources Review Commission concluded that "by the

Thus, it is obvious that Negroes will be discouraged from moving into a neighborhood where the neighborhood recreation association denies them access to its facilities because of their race.[20] Conversely, a property owner, such as Paul Sullivan, owning a share in such an association will be deterred from selling or renting his house to a Negro, because the Negro will be ineligible for purchase or assignment of the share. Since as shown, a house has greater market value if the purchaser or tenant is eligible to use the neighborhood recreation facilities, if a Negro is able to obtain housing in a community where he is barred from the swimming pool association in which the seller or landlord is a shareholder, there is an immediate loss in the value of the residence which must be borne by one of the parties to the transaction. Thus, an owner in these circumstances will either refuse to sell or rent to a Negro or else will require him to pay a higher price than the property is worth absent access to the recreation facility. And if this pattern is widespread, and if, as the record shows to be true for Northern Virginia, local governments are unwilling to duplicate privately established community recreation facilities with municipally operated facilities, Negroes will be deterred from purchasing or renting housing in whole sections of the State. Bearing in mind the Congressional purpose of assuring Negroes that their rights under the Thirteenth Amendment include "the freedom to buy what-

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year 2000 swimming will be the most popular single outdoor recreation activity." O.R.R.C., *Outdoor Recreation for America*, p. 172 1962).

[20] Increasing the availability of housing for Negroes in the suburbs is generally recognized as an important step toward alleviating the pressures felt today in the ghettos of most of our cities. Although there has been some migration of Negroes out of the center city into the suburbs of Washington, D.C., it has been slight. The Ford Foundation recently made a grant of $300,000 to establish a Housing Opportunities Council which will have a full-time staff whose function will be to encourage and aid Netroes wishing to find housing in the Washington suburbs. *The Washington Post*, p. B 1, March 28, 1969.

ever a white man can buy, the right to live wherever a white man can live" (*Jones v. Mayer Co.*, 392 U.S. at 443), a declaration by this Court that the discriminatory racial policy of Little Hunting Park, Inc. falls within the ambit of §§ 1981, 1982 is fully warranted.[21]

To agree with petitioners' contention that §§ 1981, 1982 are applicable to this case it is not necessary for the Court

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[21] Even under the view of §§ 1981, 1982 taken by the dissenters in *Jones v. Mayer Co.*, Little Hunting Park's racial policy is invalid. In the dissenting opinion it is stated that the most that can be said with assurance about the intended impact of the 1866 Civil Rights Act on private discrimination is that it was envisioned as prohibiting "official, community sanctioned discrimination in the South, engaged in pursuant to local 'customs' which in the recent time of slavery probably were embodied in laws or regulations." 392 U.S. at 475. Applying that principle to the instant case, it is significant that historically and continuing to this day, numerous aspects of Virginia's governmental and political system have been designed to foster and maintain a racially segregated society in the State. An extensive scheme of constitutional and statutory provisions has been adopted over the years which inject racial discrimination into many phases of public and private life. The "official command" to segregate contained in such enactments, when heard by private citizens such as the directors of Little Hunting Park, Inc. "has at least as much coercive effect as an ordinance." *Lombard v. Louisiana*, 373 U.S. 267, 273; and see *Reitman v. Mulkey*, 387 U.S. 369, 380. The index to the Virginia Code contains three pages of references to constitutional and statutory provisions requiring segregation of the races. Some of these laws have been invalidated through litigation. See, *e.g.*, *Loving v. Virginia*, 388 U.S. 1 (anti-miscegenation statutes); *Hamm v. Virginia State Board of Elections*, 230 F. Supp. 156 (E.D. Va.), aff'd, 379 U.S. 19 (laws requiring various public records to be kept separately by race); *Blackwell v. Harrison*, 221 F. Supp. 651 (E.D. Va.) (racial segregated seating law). Other such laws remain unchallenged. In any event, so long as segregation laws remain on the books they ostensibly reflect the policy of the State to be heeded by its citizens. For discussion of Virginia's official policy of maintaining segregated park and recreational facilities throughout the State, see *Tate v. Department of Conservation and Development*, 133 F. Supp. 53, 55-57 (E.D. Va.), aff'd, 231 F.2d 615 (C.A. 4), cert. denied, 352 U.S. 838; *Wood v. Vaughan*, 209 F. Supp. 106, 111-113 (W.D. Va.) aff'd, *sub nom. Thaxton v. Vaughan*, 321 F.2d 474 (C.A. 4).

decide whether every transaction or relationship which could be characterized as "contractual" brings § 1981 into play, or whether everything which could be characterized as "property" is covered by § 1982. The issue here is more limited. For petitioners merely assert that when an organization holds itself out as offering to the community at large the opportunity through membership to enjoy its services and facilities, the statute grants all citizens the same right as the organization makes available to white citizens as a class, that is, the right to accept the organization's offer to enjoy the benefits of membership. On this basis, there can be no question but that Little Hunting Park, Inc. is subject to the statute. The evidence shows that the association was organized and incorporated for the express purpose, as stated in its certificate of incorporation, of operating "a community park and playground facilities" for "community recreation purposes" (A. 24, 120). Consistent with this purpose, the association's recreation facilities were operated for 11 years until Dr. Freeman applied to use them on a completely open basis, available to everyone living in the geographic area defined in the by-laws. The association has never exercised any policy of selectivity in passing on applicants for membership and assignment the sole criterion for approval being residence within the prescribed area. Moreover, membership in the association is not even personal to the individual shareholder, since a person is permitted to own multiple shares for investment purposes, and shares may even be held by corporate bodies such as real estate development companies and churches.

Thus, it is evident that the trial court's characterization of Little Hunting Park as a "private social club" (A. 232, 235) is neither supported by the record nor dispositive of the question whether the association falls under §§ 1981, 1982. Little Hunting Park has never pursued a policy of exclusiveness, the usual characteristic of a private social club. Unlike the conventional social club, fraternal order or similar organization, an individual's personal compatibility with other members is not a qualification for mem-

bership in Little Hunting Park, Inc.[22] In conventional social or fraternal organizations–those having as their principal purpose the fostering of fellowship and camaraderie–friendship, tradition and common social, educational or occupational backgrounds play a major role in determining membership eligibility. In the case of Little Hunting Park, Inc., however, the sole determinant of membership eligibility is residence within the specified geographic area; within that area, it "is open to every white person, there being no selective element other than race." "*Evans v. Newton*, 382 U.S. 296, 301. The Court recently held that an establishment was not a private club which "uniformly denied membership" to Negroes but was "open in general" to all "members of the white race." *Daniel v. Paul*, 37 U.S.L. Week 4481, 4482 (June 2, 1969). As the Fourth Circuit has stated, "[S]erving or offering to serve all members of the white population within a specified geographic area is certainly inconsistent with the nature of a truly private

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[22]The trial court disregarded fundamental principles of corporation law by attributing to Little Hunting Park's directors the power to create racial or personal qualifications for members. For it is elementary that the powers of the directors to manage a corporation devolve from the purposes for which the corporation is created as set forth in its charter. Hence, in the absence any provision in Little Hunting Park's articles of incorporation derogating from the "community recreation" purposes of the corporation, the directors may no more transform the corporation into a "private social club" by barring the use of its facilities to a certain class of residents of the community than they may divert corporate property to other than recreational purposes; to do so would certainly be *ultra vires*. *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 31 Atl. 833, 836. Rather, it is mandatory upon the directors to carry out the purposes of the corporation by admitting to membership any applicant who "possesses the qualifications prescribed by the constitution and by-laws of the association." *Porterfield v. Black Bill & Doney Parks Water Users' Ass'n*, 69 Ariz. 110, 210 P.2d 335, 338-339. And see, *Meyers v. Lux*, 76 S.D. 182, 75 N.W.2d 533, 536; *Morris v. Hussong Dyeing Machine Co.*, 81 N.J. Eq. 256, 86 Atl. 1026, 1028-1029; *Carlson v. Ringgold County Mutual Telephone Co.*, 252 Iowa 748, 108 N.W.2d 478, 484-485.

club." *Nesmith v. Young Men's Christian Ass'n of Raleigh, N.C.*, 397 F.2d 96, 102. See also, *Rockefeller Center Luncheon Club, Inc. v. Johnson*, 131 F. Supp. 703, 705 (S.D. N.Y.); *United States v. Richberg*, 398 F.2d 523 (C.A. 5).

Nor is the missing element of selectivity supplied by the fact that under the by-laws of Little Hunting Park the purchase and assignment of shares is conditioned on approval by the board of directors. For the record shows that race is the only factor considered by the directors in exercising their right of approval. In this respect, the situation is no different than in *Shelley v. Kraemer, supra*, 334 U.S. 1, where the property owner similarly did not have an unlimited right to transfer his property. It too was subject to a racially restrictive covenant which was a "condition precedent" to the right of sale. 334 U.S. at 4. The exercise, therefore, by the board of directors of its right to approve assignments and determine membership eligibility on the basis of race amounts to nothing more than the explicit racial covenant in *Shelley*. Thus, whether expressly denominated a racial covenant or a right of approval is of no moment,[23] it is a racial restriction on the use of the association's recreational facilities, and hence is invalid under the 1866 Act.

III. THE FOURTEENTH AMENDMENT IS VIOLATED BY THE DISCRIMINATORY RACIAL POLICY OF LITTLE HUNTING PARK, INC., AND BY THE STATE COURT IN SANCTIONING IT

In addition to the statutory grounds for reversal of the court below, there are compelling constitutional reasons why its decision should not stand. It is well recognized that where facilities are built and operated primarily for public benefit and their operation is essentially a public function, they are subject to the limitations to which the State is

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[23] *Lauderbaugh v. Williams*, 409 Pa. 351, 186 A.2d 39; *Mountain Springs Ass'n v. Wilson*, 81 N.J. Super. 564, 196 A.2d 270, 275-277; *Tuckerton Beach Club v. Bender*, 91 N.J. Super. 167, 219 A.2d 529; and see *Harris v. Sunset Islands Property Owners, Inc.*, 116 So.2d 622 (Fla.).

subject and cannot be operated in disregard of the Constitution. *Evans v. Newton, supra*, 382 U.S. 296; *Marsh v. Alabama*, 326 U.S. 501; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308.[24] Here, the record shows that Little Hunting Park, like Bacons-field Park which was the subject of *Evans v. Newton*, performs the "public function" of providing "mass recreation" (382 U.S. at 302) for members of the community and, accordingly, may not be operated on a racially segregated basis.[25] Moreover, the racial policy adopted by Little Hunting Park has an effect on the community which extends substantially beyond what was involved in *Evans v. Newton*. For, rather than being a mere prohibition against the use of a public recreation facility by Negroes, the racial policy of Little Hunting Park, as we have seen *supra*, pp. 23-25, because of its effect on the desirability and value of homes in the area, is very likely to influence the racial composition of the neighborhood which the association serves.

In this respect the instant case is much like the restrictive covenant cases, *Shelley v. Kraemer*, *supra*, 334 U.S. 1, and *Barrows v. Jackson*, *supra*, 346 U.S. 429. Here, as in those cases, a privately organized group of individuals, by asserting its own discriminatory racial policy, is able in effect to impose a racially restrictive system on an entire neighborhood. This leads, of course, to the creation of Negro and white ghettos. The discriminatory racial policy of Little Hunting Park, therefore, no less than the discriminatory policies of those who enter into racial covenants, creates a

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[24] Accord: *Terry v. Adams*, 345 U.S. 461; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451; *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959, 968 (C.A. 4), cert. denied, 376 U.S. 938.

[25] In *Evans v. Newton*, the Court found it unnecessary to reach the question of whether Georgia, through legislative enactments, had facilitated the establishment of segregated parks. 382 U.S. at 300-301, n. 3. Virginia's official policy of maintaining segregated parks and recreation facilities is discussed in the *Tate* and *Wood* cases cited *supra*, p. 26, n. 21.

system which is the equivalent of, and has the effect of, a racial zoning ordinance. It is "as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts, enforced by the State." *Bell v. Maryland*, 378 U.S. 226, 329 (dissenting opinion of Justice Black), quoted in *Reitman v. Mulkey*, 387 U.S. 369, 385 (concurring opinion of Justice Douglas). Cf. *Buchanan v. Warley*, 245 U.S. 60.

Finally, it is noteworthy that this case, like *Shelley v. Kraemer*, involves an agreement voluntarily entered into by a white property owner and a Negro attempting to acquire property, with attempted intervention by a third party seeking to prevent performance. *Shelley* and *Barrows* make clear that where, as here, "*both* parties are willing parties" to such a contract a state court may not give legitimacy to the effort to defeat the contract "on the grounds of the race or color of one of the parties." *Bell v. Maryland*, *supra*, 378 U.S. at 331 (dissenting opinion of Justice Black) (emphasis in original). It is likewise immaterial that the party before the court who relies on the racial restriction asserts it as a basis for seeking affirmative relief or as here, raises it as a defense. There is "no significant difference between the restrictive covenant being used as a basis for an injunction by the proponent of such covenant and its assertion as a defense." *Spencer v. Flint Memorial Park Ass'n*, 4 Mich. App. 157, 144 N.W. 2d 622, 626. Accord: *Clifton v. Puente*, 218 S.W. 2d 272, 274 (Tex. Civ. App.). And see, *Rice v. Sioux City Memorial Cemetery*, 394 U.S. 70, 80 (dissenting opinion).

IV. SULLIVAN'S EXPULSION FROM THE ASSOCIATION MAY NOT BE PERMITTED TO STAND, BECAUSE IT WAS IN RETALIATION FOR HIS EFFORT TO DEAL WITH FREEMAN ON A NON-DISCRIMINATORY BASIS, AS REQUIRED BY §§ 1981, 1982

As well as creating rights for Negroes to be free from discriminatory treatment, 42 U.S.C. §§ 1981, 1982 impose correlative obligations on persons not to deal discriminatorily with Negroes. Thus, if Sullivan had refused to assign share No. 290 to Freeman because of the latter's race he would have violated the statute.

Sullivan was expelled from the corporation, and his two shares were revoked, however, as a direct result of his having dealt with Freeman, as the statute requires, on a non-discriminatory basis, and because he sought to reverse the directors' discriminatory refusal to approve the assignment in order that he could perform his obligation to Freeman under their contract. The expulsion was unquestionably retaliatory, and as "a matter of statutory construction and for reasons of public policy . . . cannot be permitted." *Edwards v. Habib*, 397 F.2d 687, 699 (C.A.D.C.) and cases cited therein at n. 38. Sullivan "was expelled from the association for doing that which the law . . . not only authorizes but encourages." *State ex rel. Waring v. Georgia Medical Society*, 38 Ga. 608, 629, 95 Am. Dec. 408. The action was therefore contrary to public policy, and judicial precedent warrants an order of reinstatement. *Ibid.* Accord: *Malibou Lake Mountain Club v. Robertson*, 219 Cal. App. 2d 181, 33 Cal. Rptr. 74, 77; *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, 113 Atl. 70; *Bernstein v. Alameda-Contra Costa Medical Ass'n*, 139 Cal. App. 2d 241, 293 P. 2d 862, 865; *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S.W. 834, 838; *Manning v. Klein*, 1 Pa. Super. 210. Cf. *National Labor Relations Board v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 424-425; *Higgins v. American Society of Clinical Pathologists*, 51 N.J. 191, 238 A.2d 665, 671. *Nash v. Florida Industrial Commission*, 389 U.S. 235.

Furthermore, as the Court recognized in *Barrows v. Jackson, supra*, 346 U.S. 249, to sanction "punishment" of a person because he has refused to discriminate would be to render nugatory the rights of Negroes to be free from discrimination. The Court stated, "The law will permit respondent to resist any effort to compel her to observe such a covenant . . . since she is the only one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use." 346 U.S. at 259. Similarly here, for the law to sanction Sullivan's punishment by expulsion because of his refusal to discriminate would render Freeman's rights under §§ 1981, 1982 illusory indeed. As the *Barrows* case also teaches, there is no question of Sullivan's standing to rely on rights guaranteed by these statutory provisions merely because they literally declare rights for non-whites only. Sullivan has standing to rely on the rights of the Negro, Freeman, since Sullivan is "the only effective adversary" (346 U.S. at 259) capable of vindicating those rights in this litigation resulting from his retaliatory expulsion from the association for having dealt with Freeman nondiscriminatorily.

V. SULLIVAN'S CONSTITUTIONAL RIGHT OF FREE SPEECH WAS VIOLATED BY LITTLE HUNTING PARK, INC. IN EXPELLING HIM BECAUSE HE DISSENTED FROM ITS DISCRIMINATORY RACIAL POLICY, AND BY THE STATE COURT IN SANCTIONING THE EXPULSION

Constitutional considerations provide further warrant for reversal of the state court's affirmance of Sullivan's expulsion from the corporation. If the directors' summary expulsion of Sullivan because of his dissent from their racial policy is allowed to stand, it will have the effect of granting them an immunity from criticism to which they are not constitutionally entitled. By assuming roles of leadership in Little Hunting Park, Inc.—an organization devoted to developing and operating a community recreation facility—the directors necessarily became parties to any matters of public

interest or public controversy in which the association might become involved. It is evident that whatever way the directors had acted with respect to the Freeman assignment, their decision was likely to be a subject for comment and criticism by members of the association, as well as other persons in the community. The directors were not, however, for constitutional reasons entitled to expel Sullivan because he voiced opposition to their discriminatory racial policy. Since, as we have shown above, the public function performed by Little Hunting Park, Inc. makes it subject to constitutional limitations, forfeiture of an individual's rights under the First Amendment may not be made a condition of use of its facilities. *Marsh v. Alabama, supra,* 326 U.S. 501; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., supra,* 391 U.S. at 308; and see *Pickering v. Board of Education, supra,* 391 U.S. 563.[26]

Further, the state court's sanctioning of Sullivan's expulsion from the recreation association because of his criticism of the directors' erection of a racial barrier to the use of its facilities is contrary to this Court's decision in *Curtis Publishing Co. v. Butts, supra,* 388 U.S. 130, holding that the First Amendment protects criticism of "public figures" who participate in events of public concern to the community. As was stated there (in the concurring opinion of Chief Justice Warren writing for a majority of the Court) with respect to the urbanized society that we know today:

> In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented

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[26] Courts have frequently been guided by the First Amendment in protecting the right of dissent within voluntary associations. See, *e.g., Crossen v. Duffy,* 90 Ohio App. 252, 103 N.E.2d 769, 778; *Mitchell v. International Ass'n of Machinists,* 196 Cal. App. 2d 796, 16 Cal. Rptr. 813, 816-820; *Madden v. Atkins,* 4 N.Y.2d 283, 151 N.E.2d 73, 78; *Gallaher v. American Legion,* 154 Misc. 281, 277 N.Y.S. 81, 85, aff'd. 242 App. Div. 604, 271 N.Y.S. 1012; *Hurwitz v. Directors Guild of America,* 364 F.2d 67, 75-76 (C.A. 2), cert. denied, 385 U.S. 971.

> through a complex array of boards, committees, commissions, corporations and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or by reason of their fame, shape events in areas of concern to society at large.
>
> Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. 388 U.S. at 163-164.

There can be little doubt that Little Hunting Park, Inc. plays the type of public role in the community that is referred to by the Chief Justice, and that the directors of the corporation are "public figures," as he used the term in the *Curtis Publishing* case. Further, as that case holds, it is violative of the First Amendment for the State to lend its judicial processes to vindicate the aggrievement asserted by a public figure against critics of his manner of participating in events of public interest. Applied to the instant case, this means that the Virginia court could not sanction the directors' action in expelling Sullivan from the association merely because in refusing to acquiesce in their discriminatory racial policy, he exercised his right to speak out critically on the issue. By holding that Sullivan's dissent from the association's policy constituted justification for his expulsion, the trial court invoked a standard of state law which had the effect of depriving Sullivan of rights protected by the First Amendment. *Pickering v. Board of Education, supra*, 391 U.S. 563. This clearly is state action falling within the ambit of the Fourteenth Amendment. "The test is not the form in which state power has been applied, but whatever the form, whether such power has in fact been exercised." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265. Accord: *Curtis Publishing Co. v. Butts, supra*, 388 U.S. at

146-155. Further, to permit the state court to sanction Sullivan's expulsion from Little Hunting Park, Inc. for protesting Freeman's exclusion from the community park would be to allow the State to "punish" him for his failure to abide by the directors' determination that he must "discriminate against non-Caucasians in the use of [his] property. The result of that sanction by the State would be to encourage" the use and observance of such racial restrictions on property. *Barrows v. Jackson, supra,* 346 U.S. at 254. See also *Reitman v. Mulkey, supra,* 387 U.S. at 380-381.

VI. SULLIVAN'S EXPRESSIONS OF DISSENT FROM THE RACIAL POLICY OF LITTLE HUNTING PARK, INC. WERE WELL WITHIN PERMISSIBLE LIMITS OF ACTIVITY FOR A MEMBER OF SUCH AN ASSOCIATION.

The facts of this case leave no doubt, as petitioners urge *supra,* pp. 32-33, that Sullivan's expulsion from Little Hunting Park, Inc. was in retaliation for his attempts to reverse the directors' discriminatory racial policy. Whether Sullivan's right of redress derives from §§ 1981, 1982, or the First and Fourteenth Amendments, in either event, as we show below, his conduct that precipatated his expulsion did not exceed the judicially recognized latitude allowed a member of such a voluntary association who disagrees with its policies. As we also show below, by bringing various false and exaggerated accusations against Sullivan in an attempt to justify his expulsion, the directors further demonstrated their purpose to retaliate against this man for his opposition to their discrimination against Freeman.

A. The judicially approved limits of membership conduct.

Expulsions of individuals from private associations for reasons contravening public policy have frequently been the occasion for courts to exercise jurisdiction to compel reinstatement. Thus, it is recognized as contrary to public policy, and hence beyond an association's power, to discipline a member for exercising a right or performing a

duty as a citizen. In the early case of *State ex rel. Waring v. Georgia Medical Society, supra,* 38 Ga. 608, 95 Am. Dec. 408, it was held that a member of a medical society who was expelled for being the surety on a Negro's bond was void as contrary to public policy because the member's action accorded with his responsibility as a citizen. See also, *Manning v. Klein, supra,* 1 Pa. Super. 210 (reporting violations by fellow union members of Sunday closing laws is citizen's responsibility and not a valid reason for expulsion from the union). Likewise, the right of a member to participate publicly in political or governmental activity, even though he may take positions that are contrary to the association's official policy has been upheld. *Mitchell v. International Ass'n of Machinists, supra,* 196 Cal. App. 2d 796, 16 Cal. Rptr. 813, (campaigning in favor of right-to-work law); *Spayd v. Ringing Rock Lodge No. 665, supra,* 270 Pa. 67, 113 Atl. 70 (petitioning legislature for repeal of a law which the union supported); *Abdon v. Wallace,* 95 Ind. App. 604, 165 N.E. 68 (giving testimony contrary to union policy at hearing conducted by Interstate Commerce Commission); *Schneider v. Local Union No. 60,* 116 La. 270, 40 So. 700 (failure to follow union's voting instructions as a member of a public body). Accord: *Ray v. Brotherhood of Railroad Trainmen,* 182 Wash. 39, 44 P.2d 787; *Stein v. Marks,* 44 Misc. 140, 89 N.Y.S. 921. Thus, the general rule is that an association may not exercise its disciplinary powers to inhibit the fundamental constitutional right of citizens "freely to publish their sentiments on all subjects." *Gallaher v. American Legion, supra,* 154 Misc. 281, 277 N.Y.S. 81, 85, aff'd, 242 App. Div. 604, 271 N.Y.S. 1012.

The right of a member to disagree with an association's policies even to the point of instituting a legal suit against it has also been sustained. Despite the ultimate harm that such action might do to the association, in view of the right of every citizen to use the courts, it has been held that "[t]he prosecution, in good faith, of a legal right for redress even if unsuccessful, is not a ground for expulsion

from an organization . . ." *Malibou Lake Mountain Club v. Robertson, supra,* 219 Cal. App. 2d 181, 33 Cal. Rptr. 74, 77. Accord: *Polin v. Kaplan,* 257 N.Y. 277, 177 N.E. 833, 835 ("It was the absolute right of the plaintiffs to bring the suit, whether they could successfully maintain it or not, and they might not be expelled for having so done."). Nor may a member be expelled for testifying as a witness in a legal proceeding adversely to the interests of the association. *Thompson v. Grand International Brotherhood of Locomotive Engineers, supra,* 41 Tex. Civ. App. 176, 91 S.W. 834, 838; *Angrisani v. Stearn,* 167 Misc. 731, 3 N.Y.S. 2d 701, 702, aff'd, 255 App. Div. 975, 8 N.Y.S. 2d 997.

It is not enough for respondents to defend Sullivan's expulsion on the ground that some of the directors were personally offended by statements that he made about their disapproval of the Freeman assignment. Since Sullivan's actions and statements were not contrary to, or prejudicial to, the basic purposes and objectives of the recreation association, the mere fact that his conduct was offensive, disparaging or even prejudicial to fellow members is not justification for his expulsion. *Allnut v. High Court of Foresters,* 62 Mich. 110, 28 N.W. 802, 804; *Barry v. The Players,* 147 App. Div. 704, 132 N.Y.S. 59; *Bernstein v. Alameda-Contra Costa Medical Ass'n, supra,* 139 Cal. App. 2d 241, 293 P.2d 862, 865; *Miller v. Builders' League of New York,* 29 App. Div. 630, 53 N.Y.S. 1016; *Pickering v. Board of Education, supra,* 391 U.S. at 571.[27] Members have wide latitude in criticizing or seeking to change association policies, even though the judgment and motives of officers or directors may be called into question. Offensive though this may be to the leadership, if a charge of

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[27] Although in Virginia an association member may be expelled for conduct which violates the "fundamental objects and purposes" of the organization, the mere fact that a member of a retail grocers' association harmed a fellow member in the course of a business transaction was held not to be a ground for expulsion, since it did not violate the fundamental purposes of the association. *Gottlieb v. Economy Stores, Inc.,* 199 Va. 848, 102 S.E.2d 345, 350-352.

improper action is "well founded, an impartial judge might conclude that it was made in the discharge of the highest duty to the [association] and that temporary injury resulting from the expose of wrong-doing was more than offset by the permanent good." *Wilcox v. Supreme Council of Royal Arcanum*, 210 N.Y. 370, 104 N.E. 624, 627. Therefore, "fair criticism" of leadership conduct is the right of a member of a voluntary association no less than "it is the right of every citizen." *Schrank v. Brown*, 192 Misc. 80, 80 N.Y.S. 2d 452, 455; see also, *Yockel v. German American Bund, Inc.*, 20 N.Y.S. 2d 774, 776-777 (Sup. Ct.) And this is so even though the criticism may properly be characterized as "severe", or "couched in exaggerated language" (*Gleiforst v. Workingmen's Sick & Death Benefit Fund*, 37 Misc. 221, 75 N.Y.S. 44, 45), or "ardent and hard-hitting." *Madden v. Atkins, supra*, 4 N.Y. 2d 283, 151 N.E. 2d 73, 77. See also *People Ex rel. Ward v. Up-Town Ass'n*, 9 App. Div. 191, 41 N.Y.S. 154, 155; *Mahoney v. Sailors' Union of the Pacific*, 43 Wash. 2d 874, 264 P.2d 1095, 1097; *Reilly v. Hogan*, 32 N.Y.S. 2d 864, aff'd, 264 App. Div. 855, 36 N.Y.S. 2d 423; *Crossen v. Duffy, supra*, 90 Ohio App. 252, 103 N.E. 2d 769.

As will be shown below, Sullivan's conduct at all times fell within the limits of allowable activity under the foregoing judicial precedents.

B. Most of the charges against Sullivan were false and the rest were exaggerated characterizations by which the directors sought to mask their true intention to expel him because of his dissent from their racial policy.[28]

The recreation association's board of directors decided on June 11, 1965, that there was "due cause" to expel Sullivan

[28]The discussion of the evidence that follows is for the purpose of aiding the Court in making an "independent examination of the record" in order to consider the application of "controlling legal principles . . . to the actual facts of the case." *Pickering v. Board of Education, supra*, 391 U.S. at 578, n. 2, and cases cited therein.

under the by-law provision permitting expulsion for conduct "inimicable [sic] to the corporation's members" (A. 59, 190). The directors reached this conclusion upon realizing the extent of his disagreement with their refusal to approve the share assignment to Dr. Freeman, and that he was seeking support from other members in an effort to secure reversal of their action. They further realized from the highly critical letters which they received from other members of the association (*infra*, n. 36, p. 45) that their authority and judgment were under serious question and scrutiny. Accordingly, Sullivan's "non acceptance" of the board's decision and continued "harrassment" of board members were cited by the board as the basis for its June 11 decision to seek his expulsion (A. 59, 160). It was thereafter necessary for Sullivan to commence a civil action in the Fairfax County court in order to obtain a postponement of the expulsion hearing so that his attorney could appear with him, and in order to obtain a statement of the specific conduct alleged to constitute the basis for his expulsion.[29]

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[29] The settlement stipulation terminating that proceeding was relied on by respondents in the trial court in this case as a defense to the prayer in Sullivan's complaint which sought reversal of the directors' refusal to approve the share assignment to Dr. Freeman (A. 84-85). The stipulation was noted by the trial judge, but he specifically refused to pass on it (A. 233). It is clear, however, that the terms of the stipulation were never met, because, first, there was never a "meeting of the general membership . . . held pursuant to [Sullivan's] petition calling the same" (A. 84). The crux of Sullivan's petition was that the membership should meet and hear Dr. Freeman, a suggestion earlier made by Father Walsh, but which the board of directors had rejected. However, the evidence shows that the membership meeting held on July 29, 1965, had an agenda substantially different from the one contained in Sullivan's petition, and the corporation's membership, as such, never voted because the meeting was too disorderly and participated in by many people who were not members. (Pl. Exs. 21, 42; A. 75, 132-133, 82-85, 116, 151-153, 168-171). Secondly, the stipulation only referred to "the assignment of the membership for this [1965] swimming year," and in no way barred Sullivan's continuing effort, by legal action or otherwise, to obtain

In an effort to justify Sullivan's expulsion and to thwart his efforts and those in agreement with him, the directors drew up a statement of charges against Sullivan. But as revealed by the record, their allegations are shown to be either completely false, or exaggerated and distorted characterizations of his actions taken to obtain recision of the association's racial policy. By resort to falsehoods and overstatements, the directors revealed their true objective, which was to compose a set of charges to serve as a pretext for expelling Sullivan because of his dissent from their discriminatory action.

The allegations against Sullivan fall into several categories, all of which relate to his reaction against the association's racial policy. First, he was charged with engaging in "harassment" of the members of the board by means of "numerous unfriendly telephone calls" that he made and caused others to make in which the directors were accused of "hatred and bigotry" (A. 73-74, 135, 181). However, this accusation is shown by the evidence to be without foundation in fact. Sullivan denied making "unfriendly" or "harassing" telephone calls to directors or calls in which he accused them of "hatred and bigotry" (A. 73-74). In response to pre-trial interrogatories, only two directors were identified by respondents as recipients of any calls: Mr. Lennon and Mrs. Moore, the association president. Lennon admitted in testimony that Sullivan made no calls to him in which he was accused of "hatred and bigotry," and stated that at most Sullivan was "impatient on occasion" (A. 135-136, 153-154). Mrs. Moore testified to no "harassing" telephone calls made by Sullivan to her. In fact, she described only one telephone conversation that she had

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approval of the assignment for 1966 and subsequent swimming years. Finally, the stipulation makes no reference to, and therefore does not affect Sullivan's prayer to enjoin continuation of the association's discriminatory racial policy because of its effect on the marketability of his real estate; nor does the stipulation affect Sullivan's cause of action arising from expulsion from the association. Further, the stipulation has no effect on Freeman's separate legal action.

with Sullivan, a call that *she* placed to him, and the most that she said about it was that he was "rude" because he interrupted her, so *she* hung up on him (A. 162, 58, 113).[30] Mrs. Moore mentioned two other telephone calls that she received during this period, one from Dr. Freeman and one from James Sutherland, a member of the association, both of whom called about arrangements for Dr. Freeman to meet the board of directors, a suggestion that had been made by Father Walsh but was rejected by Mrs. Moore (A. 162, 164). It is undisputed that neither caller accused the directors of "hatred and bigotry" (A. 108-111, 164).[31]

The second category of charges against Sullivan arose from the May 28, 1965, visit to his home by board representatives Lennon, Hanley and Egger. It was alleged that

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[30] Another charge against Sullivan is that he used "abusive" language to Mrs. Moore during that telephone conversation (A. 58, 165). This charge was revealed as baseless. For, upon being asked to explain it, Mrs. Moore referred to an exchange in the course of her conversation with Sullivan about the attitude of their parish priest, Father Walsh, toward the swimming pool racial issue. Expressing indifference to Father Walsh's views, Mrs. Moore stated rather vehemently that he did not "mean a thing" to her (A. 58, 113, 162, 165). Reacting partly in surprise to that comment, Sullivan, according to Mrs. Moore, then stated that "the action of the Board" in denying the assignment to Freeman was "immoral", "illegal" or "evil" (A. 162, 165). This language, used as it was in reference to the Board's action rather than Mrs. Moore personally, is not what would normally be characterized as "abusive."

[31] Although the charge against Sullivan was that he was responsible for a campaign of "harassing" telephone calls to *directors* of the association, respondents, in answer to pre-trial interrogatories, made a last-minute attempt to bolster their case by naming a person who was *not a director* as one who allegedly received such a call from Sullivan (A. 74-75, 135-136). The person named, Mrs. Mary Simmons, did not testify at the trial; no evidence was introduced concerning any call that she received, nor the identity of any caller; Sullivan denied ever calling her; and finally, Mrs. Moore admitted on cross-examination that no call to Mrs. Simmons by Sullivan was even considered at the time the directors voted to expel him (A. 74, 136).

on that occasion he accused the board of directors of practicing "bigotry and hatred" and that he "cast doubt on the veracity" of the three representatives who visited him. It was further alleged that he was "insulting and rude" because he made statements to the effect that he was "ashamed" of the three representatives and that the board's action in disapproving the Freeman assignment was "evil", "immoral" and "shocking" (A. 54, 181-182, 186).

While Lennon, Hanley and Egger each testified at the trial, they failed to support the allegation that Sullivan accused the board of "bigotry and hatred."[32] Nor is there record support for the allegation that Sullivan "cast doubt on the veracity" of the board representatives. As his testimony shows, Sullivan disapproves of racial discrimination, and was amazed when he learned from the board delegates that Dr. Freeman had been rejected solely because of his race. He found it particularly hard to believe the assertion of the delegation that the entire board and association membership unanimously backed the rejection, for Sullivan knew that he and others who shared his views on racial discrimination strongly disagreed (A. 52). In light of the surprising circumstances presented to him, Sullivan testified, "I did express an inability to believe, which I think is perfectly normal" (A. 54). As he further explained, "When one is confronted with an incredible situation . . . that you may find difficult or impossible to believe . . . [it] does not necessarily reflect on the veracity of the person who may relate it" (*ibid.*). It is plain, therefore, that whatever Sullivan's statement of disbelief might have been, it was at most an expression of amazement, and it distorts the common understanding of speech to construe such an incident as

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[32]The testimony of these three men and Mr. and Mrs. Sullivan concerning the May 28 meeting appears in the record as follows: Sullivan (A. 51-53, 86-88); Mrs. Sullivan (A. 112-113); Hanley (A. 149-150); Lennon (A. 150-151); Egger (A. 155-156).

"casting doubt on the veracity" of the person to whom the statement is made.[33]

Unquestionably, Sullivan was shocked and ashamed at what he considered the board's immoral action in rejecting Dr. Freeman because of his race. Sullivan had contracted with Dr. Freeman to assign the swimming pool share to him, and when Hanley related the board's offer to buy that share, Sullivan expressed his unwillingness to breach his agreement by rejecting the offer out of hand since, as he testified "I felt selling a share with the condition of racial discrimination attached to it was cooperating in an evil" (A. 52). Without doubt, Sullivan's reaction to the situation with which he was confronted and the words he used on that occasion are no different than what could be expected from vast numbers of persons, given the same circumstances.[34] Further, Sullivan, a United States government employee, testified that on May 26, 1965, two days before the delegation's visit to his home, he had received a copy of a memorandum from President Lyndon Johnson to all government employees which stated that the President "expected them to do all in their power to ensure the equal treatment of every citizen regardless of race, creed or national origin" (A. 60-61. See also, Pl. Ex. 14; A. 63,

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[33]Sullivan's reaction was shared by Rev. John M. Wells, a Unitarian minister in the Little Hunting Park area, who testified that he, along with others with whom he discussed the matter, found the discrimination against the Freeman family "almost unbelievable" (A. 174).

[34]Sullivan also testified that his actions were motivated by his religious convictions. As the record shows, Sullivan is a Catholic who viewed the disapproval of the Freeman assignment as a "problem of injustice" (A. 56, 60). Leaders of Sullivan's church and particularly Bishop Russell, head of the Diocese of Richmond, which includes Northern Virginia, have characterized racial discrimination as "primarily a moral and religious problem (A. 61-63, 85-86, 94). Information to this effect, and of the Bishop's personal efforts to combat racial discrimination, particularly in the field of housing, have been widely publicized, not only in the Catholic press, but in newspapers of general circulation, as well (*ibid.*).

191-192). Accordingly, Sullivan's reaction to the encounter with the corporation's representative on May 28 was neither unusual nor surprising.[35] He acted and spoke consistently with the principles taught by his own and other churches, and pursuant to the specific mandate of President Johnson. The words used by Sullivan are part of the vocabulary that has come to be associated with racial discrimination and reflected his sincere views on the subject. Finally, the words were no stronger, in fact they were relatively temperate, in comparison to those used by other members of the association when they learned of the directors' discrimination against the Freemans because of their race.[36]

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[35]Hanley specifically denied that Sullivan was emotional on that occasion. He testified that Sullivan "kept things under control pretty well that way" (A. 150).

[36]See particularly the letter of Paul Scott Forbes, who, in a letter to Mrs. Moore dated June 10, 1965, wrote (A. 139-140):

> My wife and I, members of Little Hunting Park, Inc. were shocked and dismayed by the narrow minded and totally unjustifiable action of the board in arbitrarily excluding a qualified membership holder on the basis of race . . . This *flagrantly unchristian violation of the scriptural admonition,* "Do unto others as you would have them do unto you," cannot be justified on any grounds and *casts an ugly shadow of bigotry* on our community, which is undeserved . . . Even if this were not so, the Board's action is *un-American* and sullies the memory of the thousands of *Americans who died in the revolution, in the Civil War and in World War II* to preserve the idea that all men are created equal, and that human rights must always come before property rights . . . I pledge to take all measures possible–including legal ones if necessary to attain these ends. [Emphasis added.]

Another letter to Mrs. Moore from a member of the association, Mrs. Richard C. Ellis, dated June 10, 1965, stated (A. 140-141):

> I see no mad rush to move out of Bucknell since the Freemans moved in, no empty houses, no panic . . . The houses on Beacon Hill Road and those behind Rollins Drive add to the appearances of Bucknell and are all lived in and kept neatly by Negroes. The school has had no problem integrating–why make an issue of the pool? . . . I have met Ted and Laura Freeman and their little boys and I not only

A third group of charges against Sullivan stems from a letter that he wrote on June 25, 1965, to Father Thomas J. Cassidy, Director of Catholic Charities for Northern Virginia, concerning his encounter with racial discrimination. (Pl. Ex. 16; A. 64-67, 193-198, 181-182). The allegation was again made that Sullivan accused the board of directors of practicing "bigotry and hatred." These words do not appear anywhere in the letter, however, thus giving the lie to the charge (A. 181, 186, 193-198).[37] Sullivan wrote the June 25 letter, as well as a follow-up letter on July 1, to Father Cassidy on the recommendation of Father Carl Zeterburg, Sullivan's former pastor (A. 64, 67-69, 88-89, 182). Father Cassidy, is charged by Bishop Russell with responsibility for problems involving race relations in the Northern Virginia area of the diocese (A. 64). Sullivan, in both his letters of June 25 and July 1, in substance asked the clergyman to exercise his moral influence in an effort to combat the racial discrimination which was being practiced by the board of directors of Little Hunting Park, Inc. Copies of the letters were sent by Sullivan to the two local priests in whose parishes Little Hunting Park is located and to Father John McMahon in Richmond, who has an overall role in the diocese with respect to matters of "social justice" (A. 88).

Sullivan, in writing the two letters, with copies sent only to Catholic clergymen, used, as would be expected, the vocabulary previously discussed, which has come to be asso-

like them, but I think they are an asset to the community, and therefore eligible to swim in our pool.

Mrs. Moore acknowledged receiving a number of letters expressing disapproval of the board's action (A. 137). Five such letters, including the two quoted above, are included in the record as Plaintiffs' Exhibits 44-48.

[37]The directors also alleged that Unitarian Minister John M. Wells was a recipient of Sullivan's June 25 letter (A. 181, 186). The uncontradicted evidence based on the testimony of both Sullivan and Reverend Wells shows that the letter was never sent to Wells and he never saw a copy of it (A. 65, 172).

ciated with racial discrimination. He noted, among other things, that Bishop Russell had referred to racial discrimination as a "real moral evil," and in the July 1 letter mentioned the Catholic Church's view that racial discrimination is a "sin" (A. 66, 68-69). The context in which these terms were used and the religious personages to whom they were addressed provide the only proper measure for assessing Sullivan's conduct in writing the letters. It cannot be doubted that he wrote them out of sincerity of conviction, and with no thought of maligning any director or even singling out any individual for criticism. His remarks were concerned solely with the subject of racial discrimination and the improper action which he believed the board as a body had taken. And it has not been alleged, nor can it be, that either of the letters contains a single word of untruth. Their only vice in the directors' eyes was that Sullivan had presumed to criticize the board's action and revealed himself as wanting to reverse the discriminatory racial policy which it had adopted.

The directors, therefore, angered by Sullivan's efforts to overturn their action and seeking to vindicate themselves, alleged as one of the grounds for his expulsion the fact that one of the parish priests to whom he sent a copy of his June 25 letter turned out, coincidentally, to be pastor of the church where Mrs. Moore was employed (A. 66, 182, 186). It is undisputed that at the time Father Joseph Wingler was sent a copy of the letter by Sullivan, the latter had no knowledge that Mrs. Moore was an employee of St. Mary's Church, and indeed, he did not even know of her religious affiliation (A. 66-67). Also, contrary to the implication conveyed by the charge against Sullivan, it is undisputed that Mrs. Moore's employment was not adversely affected in any way by Father Wingler's receipt of the letter, and that she still works for St. Mary's Church (A. 67, 134-135). When Father Wingler received the letter, he showed it to Mrs. Moore, mentioned that its subject was "none of his business," and showed his lack of interest or

concern by reading the letter once and throwing it away (A. 162, 95).[38]

Paul Sulliven's June 25 letter to Father Cassidy served still another purpose for the directors. Seizing on the fact that Sullivan sent a copy to Father Walsh, his own pastor, the directors alleged that this created a "strained relationship" between Father Walsh and the corporation (A. 67, 182, 186-187). This charge was refuted completely, however, by the signed statement of Father Walsh offered in Sullivan's behalf at the August 17 expulsion hearing. Father Walsh pointed out that there was in fact no relationship between himself and the association to strain, but even if there had been one, the letter would not have strained it (A. 67, 96-97).

Two final allegations against Sullivan hardly merit serious discussion, but they typify the scatter-gun attack that was made on him in the effort to justify his expulsion from the association. Thus, it was charged that while circulating the petition for the special membership meeting that he wanted convened, Sullivan used "violent and abusive language to members of the corporation who refused to sign" the petition (A. 76, 182, 187). By way of specification for this charge, the only member to whom Sullivan was alleged to have used such language was Alleen Winters. Mrs. Winters did not testify, and there was no evidence of any kind offered in the trial court to support this charge. On the other hand, Sullivan testified in detail about his visit to Mrs. Winters' home, as well as his prior close relationship of some 10 years standing with her and her husband (A. 75-77). Sullivan categorically denied using "violent and abu-

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[38]At the hearing on Sullivan's expulsion, a signed statement by Father Wingler was submitted to the board, stating as follows (A. 95, 98):

> This is to certify that Mr. Sullivan's letter of June 25, 1965, to Father Cassidy, of which I received a copy, was in no way detrimental to the employment status of Mrs. Virginia Moore, who works for me.

sive" language to her (A. 77). Additionally, Father Walsh, who happened to be in Mrs. Winters' home when Sullivan visited her, denied in his signed statement submitted to the board at the time of the expulsion hearing that Sullivan had used such language (A. 77, 96-97).

Finally, the directors alleged that Sullivan, by his efforts to reverse their discrimination against Freeman and his threat to bring appropriate legal action, was responsible for financial loss to the directors because they were required to retain counsel and to hold "additional meetings", thereby incurring "additional and necessary transportation expense" (A. 77-79, 182, 187). As shown *supra*, pp. 37-38, the bringing of a court proceeding against an association by a member is not a proper ground for expulsion. That this charge also lacks evidentiary foundation is shown by the fact that the by-laws of the corporation require the directors to meet once a month, and the record shows that except for the special membership meeting of July 29, 1965, and the expulsion hearing of August 17, 1965, the directors held only one meeting each month during 1965 (A. 31, 78, 165). Further, there was nothing unusual about the transportation expenses incurred by the directors in attending these meetings, for they were all held at directors' homes, and all of the directors reside in the same general neighborhood—no one living more than one mile from the Little Hunting Park swimming pool (A. 78-79).

From the foregoing it is clear beyond any question that Sullivan's expulsion from Little Hunting Park, Inc. was in reprisal for his seeking to overturn the directors' discriminatory racial policy. Because he refused to acquiesce in their disapproval of the assignment to Freeman, the directors seized on some of his actions and statements, which particularly angered them, added others of their own invention, and with this as the basis decided that they could justify his expulsion from the association.[39] As we have seen,

[39]Significantly of the various charges against Sullivan, only two involved incidents occurring before June 11, 1965, the date of the

many of the charges against Sullivan are altogether false. The rest relate to wholly legitimate means by which he expressed his disagreement with the directors' racial policy. As a dissenting member of the association, his actions and statements were at all times within the judicially recognized bounds of permissible activity.[40] See discussion *supra*, pp. 36-39. Clearly the drafting of the various specious accusations against Sullivan evidence the directors' retaliatory motive in expelling him.

VII. THE PETITIONERS HAVE VALID CLAIMS FOR DAMAGES

In each suit upon which this proceeding is based, damages are sought in the amount of $15,000. In *Jones v. Mayer Co.*, the Court refrained from passing on whether the plaintiffs could recover damages for the violation that was found of § 1982. 392 U.S. at 414-415, n. 14. Whether

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directors' decision that there was "due cause" for expelling him (A. 59, 190). Those incidents were the May 28 visit of the three association delegates to Sullivan's home and Sullivan's telephone conversation of June 7 with Mrs. Moore (*supra*, pp. 41-42). Those two incidents demonstrated to the directors Sullivan's "non-acceptance" (A. 59, 190) of their decision regarding the assignment to Freeman. Hence, it is clear that all the rest of the charges leveled against Sullivan when he was expelled in August were afterthoughts designed to justify the action that had been decided upon two months previously.

[40] In any event, "little weight" should be given to the board of directors' determination that Sullivan's conduct was "inimicable" [sic] to the corporation's members in view of the "obvious defects" from a procedural standpoint in the hearing granted him prior to his expulsion. *Pickering v. Board of Education, supra*, 391 U.S. at 578-579, n. 2. As in *Pickering*, "the trier of fact was the same body that was also the victim of appellant's statements and the prosecutor that brought the charges aimed as securing his dismissal . . . [; and] [t]he state courts made no independent review of the record." *Ibid.* Further, as noted *supra*, p. 11, Sullivan was not permitted at the expulsion hearing to learn the identity of his accusers or to question them, and he was denied permission to have a reporter present. See generally, Comment, *Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 983, 1029-1037 (1962); 6 Am. Jur. *Associations* § 36.

this proceeding is governed by §§ 1981, 1982 or provisions of the Constitution, it is clear, in any event, that damages may be awarded. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. 678, 674, and cases there cited. See also, *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40; *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 207; *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 202, 204; 42 U.S.C. § 1988. Here petitioners claims for damages are based on constitutional and statutory provisions which "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187. Familiar factors justifying compensatory and punitive damage liability are therefore appropriate for consideration. *Jones v. Mayer, supra*, 392 U.S. at 414-415, n. 14.[41] However, state rules of damages that tend to defeat the federal civil rights at issue must give way to the "federal common law of damages". *Basista v. Weir, supra*, 340 F.2d at 87; *Caperci v. Huntoon*, 397 F. 2d 799, 801 (C.A. 1), cert. denied, 393 U.S. 940. Thus, there need only be adoption of those state rules that will "effectuate the broad policies of the civil rights statutes." *Brazier v. Cherry*, 293 F.2d 401, 408 (C.A. 5), cert. denied, 368 U.S. 921; *Sherrod v. Pink Hat Cafe*, 250 F. Supp. 516, 519-520 (N.D. Miss.). Because precedents are few, petitioners respectfully urge that the Court, in its decision

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[41] In addition to such compensatory and punitive damages as may be justified, it has been suggested that in civil rights cases arising out of racial discrimination a plaintiff should be entitled to have included in his award as a third element of damages an amount "for deprivation of civil rights". Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 Tex. L. Rev. 1015, 1033 (1967). Cf. *Nixon v. Herndon*, 273 U.S. 536; *Lane v. Wilson*, 307 U.S. 268; *Myers v. Anderson*, 238 U.S. 368; *Basista v. Weir*, 340 F.2d 74, 87-88 (C.A. 3); *Washington v. Official Court Stenographer*, 251 F. Supp. 945, 947 (E.D. Pa.); *Rhoads v. Horvat*, 270 F. Supp. 307, 309-310 (D. Colo.) and cases cited.

herein, delineate standards for the granting of monetary relief, for the guidance of the court below. Among the relevant factors, petitioners submit, are the following:

The Freeman family's claim against respondents for $15,000 damages is justified by the infringement the Freemans suffered of federally guaranteed rights; their exclusion for two years from Little Hunting Park's recreation facilities including its swimming pool, with the accompanying expense and inconvenience of having to go elsewhere to find comparable facilities; and the physical and emotional injury to them resulting from the racial discrimination that they suffered with its attendant embarrassment, humiliation, indignity and loss of social prestige in the community (A. 206-216). The record shows that when the Freemans first moved into the predominantly white neighborhood where Little Hunting Park is located, they attracted little attention and were hospitably received. However, the directors' racially motivated refusal to approve the pool assignment to them precipitated a build-up of community hostility toward the Freemans and they soon were ostracised by neighbors who had previously been friendly, and were subjected to racial slurs and various forms of harrassment (A. 210, 212, 213-214). The Freemans' two young sons, ages 6 and 5, became isolated from children who had previously been their playmates in the neighborhood (A. 214). The aggravation and emotional strain resulting from respondents' discrimination against the family caused Mrs. Freeman to have a temporary nervous breakdown and interfered with Dr. Freemans' performance of his duties as a federal government employee (A. 208-211, 214-216). The psychological and emotional injury resulting from the racial discrimination against the Freemans is plainly a factor meriting consideration in determining compensatory damages. *Solomon v. Pennsylvania R. Co.*, 96 F. Supp. 709, 712 (S.D. N.Y.); *Anderson v. Pantages Theater Co.*, 114 Wash. 24, 194 P. 813, 815-816. Cf. *Brown v. Board of Education*, 347 U.S. 483, 493-494; *Browning v. Slenderella Systems of Seattle*, 54 Wash. 2d 440, 341 P.2d 859, 863-866; *McArthur*

v. Pennington, 253 F. Supp. 420, 430 (E.D. Tenn.); *Antelope v. George*, 211 F. Supp. 657, 660 (D. Idaho).

The Sullivan family's claim for $15,000 damages is grounded on Paul Sullivan's unlawful expulsion from the association; the resulting exclusion of the family from Little Hunting Park for the past three years with the necessity of having to go elsewhere for swimming and recreational facilities; and the damage to reputation, as well as physical and emotional strain, that were suffered by the Sullivans as the result of the expulsion proceeding initiated by respondents (A. 78-82, 113-115). In the recent case of *Simmons v. Avisco, Local 713, Textile Workers Union of America*, 350 F.2d 1012 (C.A. 4) a suspended member of a labor union sued in the District Court of the Eastern District of Virginia for reinstatement and damages. Based on the trial court's finding that he had been wrongfully suspended, the plaintiff was ordered reinstated, and awarded $15,000 compensatory damages for injury to reputation and resulting mental anguish. The court of appeals, in affirming, noted, as one of the justifications for the damages award, the harassment of the plaintiff, following his suspension, through anonymous and abusive telephone calls to his home. 350 F.2d at 1018. There is undisputed evidence of similar harassment of Sullivan in the instant case (A. 82, 114-115).

In *Jones v. Mayer Co., supra*, the Court left open the question whether punitive damages may be awarded under the Civil Rights Act of 1866, but referred to authorities (302 U.S. 414-415, n. 14) indicating that they are appropriate where warranted by the facts of the case, citing, *Philadelphia, Wilmington & Baltimore R. Co. v. Quigley*, 21 How. 202, 213-214; *Barry v. Edmunds*, 116 U.S. 550, 562-565; *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 367-368 (S.D. Calif.). See also, *Hague v. Committee for Industrial Organization*, 101 F.2d 774, 789 (C.A. 3), modified on other grounds, 307 U.S. 496; *Antelope v. George, supra*, 211 F. Supp. 657, 660 (N.D. Idaho); *Rhoads v. Horvat, supra*, 270 F. Supp. 307 (D. Colo.).

In the instant case, punitive damages are proper in view of the malice that may be implied from respondents' hostile and insulting conduct toward the Freemans because of their race, and in view of the animus and vindictiveness that motivated the directors in expelling Sullivan from the association. Punitive damages are justified "whether the wrongful act is done with a bad motive, or with such gross negligence as to amount to misconduct, or in a manner so wanton or reckless as to manifest a wilful disregard of the rights of others . . ." *Franklin Plant Farm Inc. v. Nash*, 118 Va. 98, 86 S.E. 836, 842; and see *Bolton v. Vellines*, 94 Va. 393, 26 S.E. 847, 850; *Baker v. Marcus*, 201 Va. 905, 114 S.E. 2d 617. As we have shown *supra*, pp. 39-50, the charges brought against Sullivan as justification for his expulsion consisted almost entirely of demonstrable untruths and gross exaggerations designed to mask the directors' antagonism toward him because he refused to acquiesce in their discrimination against Freeman and sought to reverse it. His expulsion under such circumstances, we submit, supports the awarding of punitive damages against respondents. See, *e.g.*, *International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193, 199-201 (C.A. 5).[42]

CONCLUSION

For the reasons stated, it is respectfully submitted that the Court should render a decision for petitioners. In that event, it would appear that another remand to the Supreme Court of Appeals of Virginia would be futile, in view of

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[42]The individual directors of Little Hunting Park, Inc., respondents herein, who participated in the discrimination against Dr. Freeman and the expulsion of Paul Sullivan are liable, along with the corporation, for damages based on their roles in the wrongful conduct. See *National Cash-Register Co. v. Leland*, 94 Fed. 502, 508-511 (C.A. 1) cert. denied, 175 U.S. 724; *Trounstine v. Bauer, Pogue & Co.*, 144 F. 2d 379, 382 (C.A. 2) cert. denied, 323 U.S. 777; *Hitchcock v. American Plate Glass Co.*, 259 Fed. 948, 952-953 (C.A. 3); *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-409 (C.A. 10); *American Universal Insurance Co. v. Scherfe Insurance Agency*, 135 F. Supp. 407, 415-416 (S.D. Iowa).

that court's insistence that it does not have jurisdiction over the proceeding. Therefore, petitioners respectfully suggest that the Court treat this proceeding as one on a writ of certiorari to the Circuit Court of Fairfax County, Virginia, where the cases were tried. See *Callender v. Florida*, 383 U.S. 270, 380 U.S. 519; *Adam v. Saenger*, 303 U.S. 59, 61. Cf. *Naim v. Naim*, 350 U.S. 891; on remand, 197 Va. 734, 90 S.E. 2d 849, appeal dismissed, 350 U.S. 985, where in circumstances similar to those presented here, the Supreme Court of Appeals of Virginia successfully evaded compliance with a mandate of this Court. Further, it would be appropriate for this Court to formulate an order reversing the judgments of the courts below, and directing the Circuit Court to enter an appropriate decree, including provision for such damages as that court may fix. See *Stanley v. Schwalby*, 162 U.S. 255, 279-283; 28 U.S.C. § 2106; 28 U.S.C. § 1651(a).[43]

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[43] "The power to enter judgment and, when necessary, to enforce it by appropriate process, has been said to be inherent in the Court's appellate jurisdiction." *Fay v. Noia*, 372 U.S. 391, 467 (dissenting opinion of Justice Harlan). See *Williams v. Bruffy*, 12 Otto 248, 255-256; *Tyler v. Magwire, supra*, 17 Wall. at 289-293; *Martin v. Hunter's Lessee, supra*, 1 Wheat. at 361; *McCulloch v. Maryland*, 4 Wheat. 316, 437; *Gibbons v. Ogden*, 9 Wheat. 1, 239; *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191. Cf. *N.A.A.C.P. v. Alabama, supra*, 377 U.S. at 310.

APPENDIX

STATUTES

42 U.S.C. Section 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

42 U.S.C. Section 1982. Property rights of citizens

All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R.S. § 1978.

CONSTITUTION OF THE UNITED STATES

Article VI

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution of laws of any State to the contrary notwithstanding.

* * *

AMENDMENTS

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Article XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

* * *

Article XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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RULES OF THE SUPREME COURT OF APPEALS OF VIRGINIA

Rule 5:1 The Record on Appeal

Sec. 3. Contents of Record

* * *

(f) Such a transcript or statement not signed by counsel for all partices becomes part of the record when delivered to the clark, if it is tenedered to the judge within 60 days and signed at the end by him within 70 days after final judgment. It shall be forthwith delivered to

the clerk who shall certify on it the date he receives it. Counsel tendering the transcript or statement shall give opposing counsel reasonable opportunity to examine the original or a true copy of it. The signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript or statement is authentic. He shall note on it the date it was tendered to him and the date it was signed by him.

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